



Signed: August 25, 2006

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

No. 03-44829
Chapter 7

RALBERT BROOKS-HAMILTON,

Debtor

RALBERT BROOKS-HAMILTON

A.P. No. 05-4345 AT

Plaintiff,

vs.

CITY OF OAKLAND, et al.

Defendants.

TEVIS THOMPSON, JR.

Cross-Plaintiff,

vs.

RALBERT BROOKS-HAMILTON,
et al.

Cross-Defendants

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MEMORANDUM OF DECISION

13 The motion of defendant/cross-complainant Tevis Thompson, Jr.
14 (the "Trustee"), seeking summary judgment on the claims asserted
15 against him in the complaint filed in the above-captioned adversary
16 proceeding and on his cross-claims against the plaintiff/cross-
17 defendant Ralbert Brooks-Hamilton (the "Debtor") and others came on
18 for hearing before the above-captioned Court on July 20, 2006. At
19 the conclusion of the hearing, the Court took the motions under
20 submission. The Court's decision and the basis for that decision
21 are set forth below.

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BACKGROUND

27 The Court takes judicial notice of the following background
28 facts which are a matter of public record or have been finally
29 determined in this case or in related proceedings in the bankruptcy
30 court:

31 The Debtor was a participant in a government program entitled
32 the Enhanced Enterprise Community Flagship Project Loan Program
33 (the "EEC Program"). Pursuant to this program, between 1996 and
34 1998, the Debtor borrowed \$500,000 from the City of Oakland
35 ("Oakland") and the Bank of Oakland (the "Bank") to develop a
36 business located in an area of Oakland, California designated by
37 the EEC Program as an "enterprise zone."

38 With the proceeds of these loans, the Debtor purchased real
39 property located at 880 27th Street in Oakland, California (the
40 "Warehouse"). On March 4, 1996, the Bank recorded a deed of trust

2 against the Warehouse to secure repayment of the loans. Oakland
3 recorded deeds of trust for the same purpose on July 1, 1997 and
4 July 21, 1998.

5 The Debtor failed to repay the loans. After a period of
6 forbearance, Oakland and/or the Bank commenced foreclosure
7 proceedings against the Warehouse. The Debtor attempted to stop
8 the foreclosure proceedings by various means, including by filing
9 the above-captioned bankruptcy case on August 21, 2003.¹ The case
10 was initially filed as a chapter 13 case but was converted to
11 chapter 7 on May 12, 2004.² The Trustee was appointed as the
12 chapter 7 trustee.

13 On June 10, 2005, the Trustee filed a motion to approve the
14 sale of the Warehouse free and clear of liens (the "Sale Motion")
15 through a negotiated sale subject to overbidding. The Debtor
16 opposed the sale on various grounds. His written opposition did
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19 ¹When a bankruptcy petition is filed, an automatic stay goes
20 into effect. The automatic stay renders void any act to
21 collect a pre-petition debt from the debtor or to exercise any
22 control over property of the bankruptcy estate. See 11 U.S.C.
23 § 362(a). With limited exceptions, not relevant here, the
bankruptcy estate consists of "all legal or equitable
interests of the debtor in property as of the commencement of
the case." See 11 U.S.C. § 541(a)(1).

24 ²Chapter 13 of the Bankruptcy Code permits the debtor to
25 retain possession of his property and to propose a plan for
26 repayment of his debts. See 11 U.S.C. §§ 1321, 1322. Chapter
7 requires the debtor to turn over all nonexempt property to
the chapter 7 trustee who is required to liquidate the
property and distribute the proceeds to creditors. See 11
U.S.C. § 704.

2 not include the contention that he did not own the Warehouse.³
3 However, at the hearing, he made the oral assertion that the
4 Warehouse was not property of the estate and therefore could not be
5 sold because he had transferred it to an irrevocable trust for the
6 benefit of his children before filing the bankruptcy case.

7 The Court overruled the Debtor's objections, including this
8 belatedly asserted oral objection. At a hearing conducted on July
9 7, 2005, the Court approved the sale of the Warehouse free and
10 clear of certain specified liens and interests, including the
11 claimed interest of the trust. An order approving the sale was
12 entered on July 22, 2005.⁴

13 After the order was entered, the Trustee discovered that,
14 post-petition, the Debtor had recorded two grant deeds purporting
15 to transfer title to the Warehouse and had also recorded a lis
16 pendens (the "Lis Pendens"). An amended order was entered on
17 August 8, 2005, providing that the sale was also free and clear of
18 any liens and interests created by the recordation of these
19 documents.

20 In the mean time, the Debtor filed two actions related to the
21 Warehouse in state court:
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24 ³In his bankruptcy schedules, the Debtor had listed a fee
25 simple interest in the Warehouse.

26 ⁴The Warehouse was sold at auction to Ken Sherman and San Manh
(the "Buyers") for \$590,000.

2 On June 13, 2005, the Debtor filed an action in state court,
3 seeking to enjoin the sale and naming Oakland, Oakland's attorney,
4 Chris Kuhner ("Kuhner"), the Trustee, and the Trustee's real estate
5 agent, Michael Natarro ("Natarro") as defendants. The action (the
6 "Injunction Proceeding") was removed to this court by the Trustee
7 on July 12, 2005 and was designated A.P. No. 05-4314. On October
8 3, 2005, the Court issued an order dismissing Oakland and Kuhner
9 from the proceeding. On July 20, 2006, the Court issued an order
10 granting the Trustee's and Natarro's motion for summary judgment,
11 dismissing all remaining claims.

12 On July 12, 2005, the Debtor filed a second action in state
13 court. In this action, the Debtor sought to quiet title to the
14 Warehouse, naming Oakland and the Trustee as defendants.⁵ The
15 Debtor filed an amended complaint (the "Complaint") on July 18,
16 2005. This action (the "Quiet Title Proceeding") was removed to
17 the bankruptcy court on August 8, 2005 by Oakland and was
18 designated A.P. No. 05-4345: i.e., the above-captioned adversary
19 proceeding. On October 3, 2005, the Court issued an order
20 dismissing Oakland from this proceeding as well.

21 The Trustee filed an answer to the Complaint and a cross-
22 complaint against the Debtor and various other individuals and
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24 ⁵On July 18, 2005, the Debtor amended the complaint to add the
25 Buyers and Yan Guang Qui ("Qui") as defendants. However, on
26 December 15, 2005, he voluntarily dismissed Qui who was an
unsuccessful bidder for the Warehouse. It does not appear
that the Debtor has ever served the Buyers with a copy of the
Complaint.

2 entities. An amended cross-complaint (the "Cross-Complaint") was
3 filed on August 18, 2005. The cross-defendants (the "Cross-
4 Defendants") all filed answers to the Cross-Complaint.

5 On June 23, 2006, the Trustee filed a motion for judgment on
6 the pleadings and/or to dismiss the claims asserted in the
7 Complaint and for summary judgment on some of the claims asserted
8 in the Cross-Complaint. The Debtor filed an opposition to the
9 motion. The Cross-Defendants other than the Debtor (the "Nondebtor
10 Cross-Defendants") filed a separate opposition. The motion came on
11 for hearing on July 20, 2006 and at the conclusion of the hearing
12 was taken under submission.

13 **APPLICABLE LAW**

14 A motion to dismiss for failure to state claim under Rule
15 12(b)(6) of the Federal Rules of Civil Procedure (hereinafter
16 "FRCP"), made applicable to this proceeding by Rule 7012(b) of the
17 Federal Rules of Bankruptcy Procedure (hereinafter "FRBP"), may be
18 granted if the allegations of the claim, even if true, do not
19 provide a basis for judgment in the nonmoving party's favor. In
20 making this determination, all reasonable inferences must be drawn
21 from the allegations in favor of the nonmoving party. Triton
22 Energy Corp. v. Square D Co., 68 F.3d 1216, 1220 (9th Cir. 1995).

23 A motion for judgment on the pleadings under FRCP 12(c), made
24 applicable to this proceeding by FRBP 7012(b), may be granted when
25 the pleadings show there are no issues of material fact. Fed. R.
26 Civ. Proc. 12(c); Gen. Conf. Corp. of Seventh-Day Adventists v.

2 Seventh-Day Adventist Congregational Church, 887 F.2d 228, 230 (9th
3 Cir. 1989), cert. denied, 493 U.S. 1079 (1990). "All allegations
4 of fact by the party opposing the motion are accepted as true, and
5 are construed in the light most favorable to that party." Id.
6 Where, on a motion for judgment on the pleadings, matters outside
7 the pleadings are presented, the motion shall be treated as one for
8 summary judgment under FRCP 56. Fed. R. Civ. Proc. 12(c).

9 A motion for summary judgment under FRCP 56 (made applicable
10 herein by FRBP 7056) may be granted if the pleadings, declarations,
11 and other discovery on file show that no genuine issue exists as to
12 any material fact. Fed. R. Civ. Proc. 56(c); see In re Rogstad,
13 126 F.3d 1224, 1227 (9th Cir. 1997). A court reviewing a summary
14 judgment motion must view the evidence in the light most favorable
15 to the nonmoving party. See Triton Energy Corp., 68 F.3d at 1220.

16 **DISCUSSION**

17 The Complaint asserts two claims for relief: (1) for quiet
18 title and (2) for equitable estoppel. The Cross-Complaint asserts
19 six claims for relief: (1) to avoid post-petition transfers under
20 11 U.S.C. § 549, (2) to avoid unperfected liens or transfers under
21 11 U.S.C. § 544, (3) to avoid fraudulent transfers under Cal. Civ.
22 Code § 3439.04, (4) to avoid fraudulent transfers under Cal. Civ.
23 Code § 3439.05, (5) for declaratory relief, and (6) to declare the
24 post-petition recordation of a lis pendens against the Warehouse as
25 a violation of the automatic stay pursuant to 11 U.S.C. § 362 and
26 therefore void.

2 The principal issue raised by these pleadings is set forth in
3 both the first claim for relief in the Complaint and the fifth
4 claim for relief in the Cross-Complaint: i.e., whether the Debtor
5 effectively transferred his interest in the Warehouse to an
6 irrevocable trust prior to filing for bankruptcy so that the
7 Warehouse was not property of his bankruptcy estate and could not
8 effectively be sold by the Trustee. The Court addresses this issue
9 in section A below. The Court addresses the second claim for
10 relief in the Complaint and the first, second, fourth, and sixth
11 claims for relief in the Cross-Complaint in section B below.⁶

12 **A. WAS WAREHOUSE PROPERTY OF DEBTOR'S BANKRUPTCY ESTATE?**

13 In the Complaint, the Debtor identifies himself as the settlor
14 of the B.H. & Associates Unincorporated Business Organization
15 Family Holding Trust (the "B.H. & Associates Trust"). He alleges
16 that the Trustee claims an interest adverse to him and the
17 beneficiaries of the B.H. & Associates Trust. He seeks judgment
18 quieting title to the Warehouse in favor of the B.H. & Associates
19 Trust.

20 In support of these allegations, the Debtor attaches a series
21 of exhibits. Exhibit A consists of two grant deeds, purporting to
22 transfer title to the Warehouse to the B.H. & Associates Trust.
23 The first grant deed bears a signature date for the Debtor of
24 August 23, 1999 (the "August 23 Grant Deed"). The second grant

26 ⁶The Trustee's motion for summary judgment did not address the
third claim for relief in the Cross-Complaint.

2 deed bears two signature dates for the debtor: i.e., August 20,
3 1999 and July 8, 2005 (the "August 20 Grant Deed").⁷ Both grant
4 deeds (collectively the "Grant Deeds") were recorded after the
5 Debtor filed his bankruptcy petition.⁸

6 Exhibits B and C appear to be copies of the same document.
7 The document is entitled Declaration of Trust. In it, the Debtor
8 declares that, on the date of his death, he will hold the Warehouse
9 in trust for the use and benefit of his children. The first page
10 of the document identifies the document as an Amendment to a
11 recorded document numbered #99323112.⁹ Both Exhibit B and C bear a

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13 ⁷The name of the trust on August 20 Grant Deed does not
14 include the phrase "& Associates." However, the Court assumes
15 that this was a scrivener's error. There is no evidence that
16 there was more than one trust created by the Debtor.

17 ⁸The integrity of these documents is highly suspect. First,
18 it is questionable whether the Debtor actually signed these
19 two grant deeds in 1999. The Debtor's signature on August 23
20 Grant Deed was not notarized until September 14, 2004, the day
21 before the August 23 Grant Deed was recorded. The Debtor's
22 signature on the August 20 Grant Deed appears to have been
23 notarized on July 8, 2005, the same day it was recorded.
24 However, the notary provision is crossed out. Second, the
25 first page of the August 23 Grant Deed, which purports to be a
26 two page document, states that it is page 1 of 1. The second
page of both grant deeds appears to be a copy of the same
document, a legal description, which is identified as page 4
of 5. However, the Court will assume for purposes of this
decision that the Grant Deeds were signed on August 20 and 23,
1999 respectively.

⁹A copy of this document (the "Exhibit D Declaration of
Trust") is attached as Exhibit D to the Declaration of Miriam
Khatiblou in support of the Trustee's motion for summary
judgment (the "Khatiblou Declaration"). This document is also
entitled Declaration of Trust and is the same form of document
as Exhibits B and C to the Complaint. The Debtor's signature
on the Exhibit D Declaration of Trust is dated August 5, 1999.

2 recordation date of March 21, 2000 and the same recordation number:
3 #2000082861.

4 Exhibit C bears a March 21, 2000 date for the Debtor's
5 signature and attaches a notary form notarizing the Debtor's
6 signature on the same date. Paragraph 5 of the Exhibit C
7 Declaration of Trust contains the following language:

8 5. I reserve unto myself the power and right
9 at any time during my lifetime to amend or
10 revoke in whole or in part the trust hereby
11 created without the necessity of obtaining the
12 consent of the beneficiary and without giving
13 notice to the beneficiary. The sale or other
14 disposition by me of the whole or any part of
15 the property held hereunder shall constitute as
16 to such whole or part a revocation of this
17 trust.

18 The B.H. & Associates Trust is named as the successor trustee, to
19 serve as trustee in the event of the Debtor's incapacity.

20 In the Exhibit B Declaration of Trust, paragraph 5 is
21 interlineated. In addition, the Debtor's signature appears to bear
22 a date of August 20, 1999. By scrutinizing the document, however,
23 one can see that this date was written over a March 21, 2000

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However, his signature was not notarized until August 23,
1999. According to a preliminary title report attached as
Exhibit B to the Khatiblou Declaration, the Exhibit D
Declaration of Trust was recorded on August 23, 1999. The
principal difference between the Exhibit D Declaration of
Trust and Exhibit B and C Declarations of Trust is that, in
the former, the Debtor declares that he holds the Warehouse
for the use and benefit, upon his death, of Ralbert Brooks
Hamilton. Thus, the need for the amendment.

2 date.¹⁰ Again, for purposes of this decision, the Court will
3 assume that Exhibit B was interlineated before it was signed or
4 recorded and was actually signed by the Debtor on August 20, 1999.

5 The Trustee seeks summary judgment in his favor on the
6 Debtor's first claim for relief which presents the same issue as
7 his fifth claim for relief in the Cross-Complaint, for declaratory
8 relief. He contends that none of the documents attached to the
9 Complaint were sufficient to prevent the Warehouse from becoming
10 property of the bankruptcy estate when the Debtor filed his
11 bankruptcy petition. The Court agrees.

12 The Court will assume for purposes of this decision that the
13 Grant Deeds were executed prior to the Debtor's bankruptcy case and
14 effectively transferred the Warehouse to a trust. The question
15 remains whether the effect of this transfer prevented the Warehouse
16 from becoming property of the Debtor's bankruptcy estate when he
17 filed his bankruptcy petition. This depends on the terms of the
18 trust. Neither of the two Declarations of Trust attached to the
19 Complaint contain terms permitting such a construction.

20 The Exhibit C Declaration of Trust, in which paragraph 5 was
21 not interlineated, expressly stated that the Debtor could revoke
22 the trust. Under California law, when the settlor of a trust
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24 ¹⁰Again, both Exhibits B and C appear to be incomplete
25 documents. Exhibit B contains only four pages. However, the
26 bottom of each page indicates that the complete document
contains six pages. Exhibit C consists of five pages. The
last page of this document is a notary form which indicates
that the complete document consists of seven pages.

2 retains the power to revoke a trust, the trust res remains the
3 settlor's property subject to his creditor's claims. See Cal.
4 Prob. Code § 15800; § 18200 (property in revocable trust is subject
5 to claims of settlor's creditors during settlor's lifetime); Empire
6 Props. v. County of Los Angeles, 44 Cal. App. 4th 781, 786-87
7 (1996)(transfer of real property to revocable trust does not change
8 ownership for property tax reassessment purposes). See also In re
9 Irwin, 338 B.R. 839, 854-53 (E.D. Cal. 2006)(property transferred
10 to revocable trust was property of the settlor's bankruptcy
11 estate); In re Schmitt, 215 B.R. 417, 422, n.1 (Bankr. 9th Cir.
12 1997)(under Oregon law, interest of beneficiary of revocable trust
13 did not become property of beneficiary's bankruptcy estate).
14 Although paragraph 5 was interlineated on the Exhibit B Declaration
15 of Trust, the Exhibit B Declaration of Trust did not expressly
16 state that the trust was irrevocable. Under California law, a
17 trust is revocable unless it is expressly stated to be irrevocable.
18 See Cal. Prob. Code § 15400.

19 However, in his opposition to the Trustee's motion for summary
20 judgment, the Debtor produced a new trust document which is
21 entitled "Irrevocable Pure Trust Agreement August Twentieth Nineteen
22 [sic] Hundred and Ninty [sic] Nine The Brooks-Hamilton
23 Unincorporated Family, Business, Pure Trust Organization-Holding
24 Trust Formation, Establishment and Adoption of" (the "Irrevocable
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2 Trust Agreement").¹¹ The Irrevocable Trust Agreement purports to
3 have been executed by the Debtor and his three brothers on August
4 20, 1999.¹² It provides that the brothers agree to permanently and
5 irrevocably establish an family trust to hold all of the family's
6 assets for the benefit of the Brooks-Hamilton family's children
7 (the "Irrevocable Trust").

8 The Irrevocable Trust is to be managed by the four brothers,
9 as trustees, with the Debtor acting as Chairperson. The
10 Irrevocable Trust Agreement names B.H. & Associates Trust as the
11 successor trustee in case the settlor should become incapacitated
12 during his lifetime before the beneficiaries reach the age of
13 twenty-one. (See paras. 4 & 7.). Paragraph 5 provides that the
14 trust assets may not be voluntarily or involuntarily assigned.
15 Para. 6 provides as follows:

16 6. The settlor reserves unto himself the power
17 and right during his lifetime to: (1) place a
18 mortgage or other liens upon the property (2)
to collect any rental or other income which may

19 ¹¹He also attaches a document entitled "Fictitious Long Form
20 Deed of Trust and Assignment of Rents" (the "Fictitious Deed
21 of Trust"). The Fictitious Deed of Trust appears to be a copy
22 of a generic deed of trust document recorded in Alameda
23 County, California in 1961 by Title Insurance and Trust Co.
24 It contains no reference to the Debtor, to any trust, or to
25 the Warehouse. Its only relevance to this proceeding is that
paragraph 8 of the Irrevocable Trust Agreement purports to
adopt provisions 1 through 14 of the Fictitious Deed of Trust
into the Amended Deed of Trust. No coherent argument is made
as to how this document adds any substance to the Debtor's
claim.

26 ¹²The signatures are not notarized, and it does not appear
that the Irrevocable Trust Agreement was ever recorded.

2 accrue from the trust property and to pay such
3 income to himself as an individual. He shall
4 be exclusively entitled to all such income
5 accruing from the trust properties/assets
6 during his lifetime and no beneficiary named
7 therein shall have any claims upon such income
8 and or profits distributed to him.

6 In the opposition filed by the Nondebtor Cross-Defendants, the
7 Nondebtor Cross-Defendants note that, a deed of trust (the "Deed of
8 Trust") and an amended deed of trust (the "Amended Deed of Trust")
9 were recorded on August 23, 1999 and March 21, 2000, respectively,
10 with respect to the Warehouse (collectively the "Deeds of
11 Trust").¹³ They note that the Deeds of Trust contain the word
12 "grant." They contend that the use of the word "grant" is all that
13 is required to transfer title to real property, citing Cal. Civ.
14 Code § 1092.

15 The Nondebtor Cross-Defendants also note that Deeds of Trust
16 refer to an agreement executed in August 1999. They apparently
17 reason that, even if the Deeds of Trust were insufficient to
18 transfer title to real property by themselves, they incorporated
19 the Irrevocable Trust Agreement into the Deeds of Trust. As a
20 result, the combined documents not only transferred title to the
21 Warehouse, when the Deeds of Trust were recorded, the transfer
22 became perfected.

23 The Trustee responds that, at best, the Deeds of Trust
24 transferred a security interest in the Warehouse. They did not
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26 ¹³Copies of the Deeds of Trust are attached to the Khatiblou
Declaration as Exhibits F and G, respectively.

2 transfer title. He notes that, under California law, a deed of
3 trust is comparable to a mortgage. A mortgage does not transfer
4 title to real property. It merely imposes a lien upon it. In
5 support of this contention, he cites Monterey S.P. Partnership v.
6 W.L. Bangham, Inc., 49 Cal. 3d 454, 460 (1989); Bank of Italy Nat.
7 Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 656-57 (1933).

8 Moreover, the Trustee notes that the Deeds of Trust state that the
9 grant is for purposes of securing an obligation. They do not
10 purport to transfer title to the Warehouse.

11 The Court agrees that the Deeds of Trust were insufficient to
12 transfer title to the Warehouse to the Irrevocable Trust.¹⁴ It is
13 true that, as the Nondebtor Cross-Defendants note, Cal. Civ. Code §
14 1092 uses the word "grant" in the language proscribed for
15 transferring title to real property. However, that word may not be
16 read in isolation. The critical phrase stated in § 1092, taken as
17 a whole, is a "grant...[of] all that real property situated in,"
18 the property description to be provided.

19 By contrast, the Deeds of Trust grant an interest in the
20 Warehouse "with power of sale...to secure performance of a certain
21 obligation...." Cal. Civ. Code § 2872 provides that a transfer of
22 an interest in real property to secure performance of an act
23 creates a lien on the real property in question. Section 2888
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25 ¹⁴The Court will assume for the purposes of this decision that
26 the Debtor, with his three brothers, actually signed the
Irrevocable Trust Agreement in 1999.

2 provides that a lien transfers no title to the property subject to
3 the lien. Moreover, the reference in the Deeds of Trust to the
4 agreement executed in 1999 did not purport to incorporate the terms
5 of the agreement into the Deed of Trust. The reference indicates
6 that the Deeds of Trust is to secure obligations under the
7 referenced agreement.

8 Thus, the only document capable of transferring title to the
9 the Warehouse was the Irrevocable Trust Agreement. Unlike the
10 Exhibit B and C Declarations of Trust, as indicated by its title,
11 the Irrevocable Trust Agreement is irrevocable. Therefore, the
12 authorities cited above, holding that property transferred to a
13 revocable trust does not change the beneficial ownership of the
14 property, are inapplicable.

15 As noted above, the Irrevocable Trust Agreement contains an
16 anti-alienation provision. Pursuant to 11 U.S.C. § 541(c)(2), such
17 provisions are enforceable in a bankruptcy case to the same extent
18 that they are enforceable under applicable nonbankruptcy law, in
19 this case, California law. However, under California law, when the
20 settlor is a beneficiary of the trust, any spendthrift provisions
21 are invalid. See Cal. Prob. Code § 15304(a); In re Schneider's
22 Estate, 140 Cal. App. 2d 710, 171 (1956). Where the trust
23 agreement provides that the trustee has the discretion to pay the
24 income or principal (or both) to the settlor/beneficiary, the
25 settlor's beneficial interest in the trust is the maximum amount
26 that could be paid. See Cal. Prob. Code § 15304(b).

2 Although the Debtor is not a named beneficiary under the
3 Irrevocable Trust Agreement, the bulk of the beneficial interest in
4 the Warehouse belonged to him when he filed his bankruptcy
5 petition. As noted above, paragraph 6 of the Irrevocable Trust
6 Agreement permitted the Debtor to encumber the Warehouse up to its
7 full value, leaving his children with an interest of little value.
8 This beneficial interest in the Warehouse became property of the
9 Debtor's bankruptcy estate, capable of being transferred by the
10 Trustee. See In re Barnes, 275 B.R. 889, 895 (Bankr. E.D. Cal.
11 2002); see also In re Neutron, 922 F.2d 1379, 1383 (9th Cir. 1990
12 (beneficial interest in trust not protected by spendthrift
13 provision is property of bankruptcy estate).

14 Nevertheless, assuming the Irrevocable Trust Agreement was
15 executed prior to the Debtor's bankruptcy filing, it did
16 effectively transfer an interest in the Warehouse to the Debtor's
17 children, albeit an interest of little value. Thus, the Trustee is
18 only entitled to partial summary judgment on the first claim for
19 relief in the Complaint and the fifth claim for relief in the
20 Cross-Complaint.

21 **B. OTHER CLAIMS ASSERTED IN COMPLAINT AND CROSS-COMPLAINT**

22 **1. Second Claim for Relief in Complaint--Equitable Estoppel**

23 In the second claim for relief in the Complaint, the Debtor
24 recites his version of the history of his loan from Oakland,
25 alleging that Oakland acted wrongfully to his detriment. On that
26 basis, he seeks to estop the Trustee from acquiring any interest in

2 the Warehouse. The Trustee asserts that the second claim for
3 relief--for equitable estoppel--should be dismissed pursuant to
4 FRCP 12(b)(6). He notes that the allegations of wrongdoing are all
5 directed to the Bank's conduct. No basis for estopping the Trustee
6 is alleged.

7 The elements of a claim for equitable estoppel are that:

8 (1) the party to be estopped knows the facts,
9 (2) he or she intends that his or her conduct
10 will be acted on or must so act that the party
11 invoking estoppel has a right to believe it is
12 so intended, (3) the party invoking estoppel
must be ignorant of the true facts, and (4) he
or she must detrimentally rely on the former's
conduct.

13 U.S. v. Hemmen, 51 F.3d 883, 892 (9th Cir. 1995). The allegations
14 fail to satisfy any of the elements of this claim against the
15 Trustee. Therefore, the Trustee is entitled to have this claim
16 dismissed.

17 **2. First Claim for Relief in Cross-Complaint--Avoidance of
Grant Deeds and Lis Pendens**

18 In the first claim for relief in the Cross-Complaint, the
19 Trustee seeks to avoid the liens created by recordation of the
20 Grant Deeds and Lis Pendens under 11 U.S.C. § 549.¹⁵ Section 549
21 provides that a trustee may avoid a post-petition transfer of
22 property of the estate that is not authorized by either the

23 ¹⁵The Trustee also seeks to recover the avoided transfers for
24 the benefit of the estate pursuant to 11 U.S.C. § 550. A
25 transfer avoided under 11 U.S.C. § 549 may be recovered under
26 11 U.S.C. § 550. However, when the avoided transfer is a lien
on real property, this additional remedy is unnecessary. The
value of the real property freed up by the avoidance of the
lien is automatically preserved pursuant to 11 U.S.C. § 551.

2 Bankruptcy Code or the bankruptcy court. This motion will be
3 granted with respect to the Grant Deeds and denied with respect to
4 the Lis Pendens.

5 The Nondebtor Cross-Defendants do not oppose avoidance of any
6 liens created by recordation of these documents. The Debtor's
7 opposition asserts only that he acted innocently, without
8 fraudulent intent. He contends that he recorded the Grant Deeds on
9 the recommendation of the Alameda County Recorder's Office. He
10 states that he was not aware that recording the Lis Pendens was
11 improper.

12 The recordation of the Grant Deeds may clearly be avoided
13 under 11 U.S.C. § 549. As discussed above, the Court has concluded
14 that, for the most part, the beneficial interest in the Warehouse
15 was property of the Debtor's bankruptcy estate. The recordation of
16 the Grant Deeds constituted a transfer of this beneficial interest
17 although the transfer was insufficient to prevent the Warehouse
18 from becoming property of the Debtor's bankruptcy estate.¹⁶ The
19 Debtor's bankruptcy case was commenced on August 21, 2003. The
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21 ¹⁶A transfer of an interest in real property occurs when a
22 deed is executed and delivered to the buyer, regardless of
23 whether it is recorded. In re Roosevelt, 87 F.3d 311, 316-18
24 (9th Cir. 1996); Obranovich v. Stiller, 220 Cal. App. 2d 205,
25 207-08 (1963). However, this transfer is only effective
26 between parties to the transaction and other with notice of
it. Cal. Civ. Code. § 1217; In re Weisman, 5 F.3d 417, 420
(9th Cir. 1993). A second transfer occurs when the deed is
recorded. This transfer gives constructive notice to the
world of the transfer effected earlier pursuant to the deed.
Cal. Civ. Code § 1213; In re Guilino, 779 F.2d 546, 551, n.3
(9th Cir. 1985).

2 Debtor recorded the Grant Deeds on September 14, 2004 and July 8,
3 2005. Thus, the recordation occurred post-petition. The Debtor
4 was not authorized to record these documents by either the
5 Bankruptcy Code or the bankruptcy court.

6 The Debtor's alleged lack fraudulent intent is irrelevant to
7 this claim. "The intent of the parties effecting the transfer is
8 irrelevant under § 549. Likewise, fraud is not an element for a
9 cause of action by the Trustee under § 549." In re Dreiling, 233
10 B.R. 848, 876 (Bankr. D. Col. 1999) (citing In re Kingsley, 208
11 B.R. 918 (8th Cir. 1997) and In re Dartco, Inc., 197 B.R. 860
12 (Bankr. D. Minn. 1996)). As a result, the Trustee's motion for
13 summary judgment will be granted with respect to the Grant Deeds.

14 However, the recordation of the Lis Pendens may not be avoided
15 under 11 U.S.C. § 549. Section 549 only provides for the avoidance
16 of a "transfer" of interest in property of the estate. The
17 recordation of a lis pendens does not result in a transfer of an
18 interest in the property in question. Rather, the recordation
19 gives constructive notice to a prospective buyer of the pendency of
20 a legal proceeding affecting title to or the right of possession of
21 the real property. In re Lane, 980 F.2d 601, 603 (9th Cir.
22 1992)(citing Cal. Civ. Proc. Code § 409(a)); In re Chenich, 87 B.R.
23 101, 106 (Bankr. 9th Cir. 1988).

24 This notice prevents a buyer from claiming bona fide purchaser
25 status with respect to the claim asserted in the legal proceeding
26 if the claim proves valid. Lane, 980 F.2d at 604-05 (citing Cal.

2 Civ. Code § 1214). Thus, the Trustee's motion for summary judgment
3 must be denied to the extent it relates to the Lis Pendens.¹⁷

4 **3. Second Claim for Relief--Avoidance of Grant Deeds**
5 **Pursuant to 11 U.S.C. § 544(a)(3)**

6 In the second claim for relief in the Cross-Complaint, the
7 Trustee seeks to avoid the transfers effected by the execution (as
8 opposed to the recordation) of the Grant Deeds under 11 U.S.C. §
9 544(a)(3). Having prevailed on his motion for summary judgment on
10 the first claim for relief as to the Grant Deeds, the Trustee is
11 also entitled to summary judgment on this claim.

12 Section 544(a)(3) provides that a trustee may avoid a pre-
13 petition transfer by the debtor that would be voidable by a bona
14 fide purchaser of the real property that has perfected its interest
15 in the real property prior to the filing of the bankruptcy
16 petition. 11 U.S.C. § 544(a)(3). This enables a trustee to avoid
17 transfers that could have been avoided under state law by a bona
18 fide purchaser of real property whose interest was perfected prior
19 to the filing of the bankruptcy petition. See In re Tleel, 876
20 F.2d 769, 772 (9th Cir. 1989).

21 Under California law, an unrecorded transfer of real property
22 is void as against a bona fide purchaser that has perfected his
23 interest in the real property. Cal. Civ. Code § 1214. As a result

24 ¹⁷However, as discussed below, the recordation of the Lis
25 Pendens violated the automatic stay. As a result, it was
26 void. In re Schwartz, 954 F.2d 569, 573-74 (9th Cir. 1992).
The Trustee and/or the current owner of the Warehouse is
entitled to have the Lis Pendens expunged. See Cal. Civ.
Proc. Code § 405.30.

2 of the avoidance of the recordation of the Grant Deeds, pursuant to
3 the first claim for relief, the transfers represented by the
4 execution of the Post-Petition Grant Deeds are rendered unperfected
5 and thus subject to avoidance under 11 U.S.C. § 544(a)(3).¹⁸

6 Again, the Nondebtor Cross-Defendants do not oppose the
7 Trustee's motion for summary judgment on this claim. The Debtor
8 asserts only that he did not act with fraudulent intent. As with
9 the prior claim, the Debtor's bad faith is not an element of the
10 claim, and his good faith is not a defense.

11 **6. Fourth Claim for Relief--Avoidance of Deeds of Trust as**
12 **Fraudulent Transfers Pursuant to Cal. Civ. Code § 3439.05**

13 The Trustee's fourth claim for relief seeks to avoid any
14 transfers of an interest in the Warehouse created by the Deeds of
15 Trust as fraudulent transfers under state law. The Trustee
16 contends that the transfers were made without receiving reasonably
17 equivalent value at a time when the Debtor was insolvent (or
18 rendered the Debtor insolvent). As a result, they were fraudulent
19 under Cal. Civ. Code § 3439.05.¹⁹

20 ¹⁸Had the Trustee anticipated that the Court would conclude
21 that the Debtor's children obtained a beneficial interest in
22 the Warehouse by virtue of the Irrevocable Trust Agreement,
23 albeit of limited value, he presumably would have sought to
24 avoid that interest pursuant to 11 U.S.C. § 544(a)(3) as well.
However, to the Cross-Complaint would need to be amended to
assert such a claim before a motion for summary judgment
seeking to avoid this transfer could be entertained.

25 ¹⁹Section 3439.05 of the California Civil Code provides that:
26 A transfer made or obligation incurred by a debtor
is fraudulent as to a creditor whose claim arose
before the transfer was made or the obligation was

2 Section 544(b) of the Bankruptcy Code permits a trustee to
3 assert a claim to avoid a fraudulent transfer pursuant to state law
4 to the extent there is an actual creditor with an allowable claim
5 against the estate that could have asserted such a claim. See 11
6 U.S.C. § 544(b). The fourth claim for relief does not allege the
7 existence of such a creditor. Therefore, the motion for summary
8 judgment with respect to this claim must be denied.²⁰

9 **5. Sixth Claim for Relief--Invalidation of Lis Pendens**
10 **Pursuant to 11 U.S.C. § 362**

11 The Trustee's sixth claim for relief seeks a declaration that
12 the Lis Pendens is void as a violation of the automatic stay. See
13 11 U.S.C. § 362(a). Again, the Debtor opposes the motion for
14 summary judgment on this claim on the ground that any stay
15 violation was unintentional. He asserts that he was not
16 represented by counsel at the time he recorded the Lis Pendens and
17
18

19 incurred if the debtor made the transfer or incurred
20 the obligation without receiving a reasonably
21 equivalent value in exchange for the transfer or
22 obligation and the debtor was insolvent at that time
or the debtor became insolvent as a result of the
transfer or obligation.

23 ²⁰There are other problems with this portion of the motion.
24 First, it seeks a declaration that the Declarations of Trust
25 were testamentary devices. However, the fourth claim for
26 relief contains no allegations relating to the Declarations.
Second. It seeks a declaration that the Deeds of Trust were
not monetary liens and have no value. This contention
requires the production of evidence. No evidence has been
supplied.

2 was unaware of the prohibition.²¹

3 As noted above, when a bankruptcy case is filed, a stay of
4 various acts against the debtor or property of the bankruptcy
5 estate automatically arises. Actions taken in violation of the
6 automatic stay are void. See 40235 Washington St. Corp. v.
7 Lusardi, 329 F.3d 1076, 1080 (9th Cir. 2003); Schwartz, 954 F.2d at
8 573-74.

9 The Ninth Circuit Bankruptcy Appellate Panel has held that the
10 recordation of a lis pendens against property of the estate is a
11 violation of 11 U.S.C. § 362(a)(6)(prohibiting an act to collect,
12 assess, or recover a claim against the debtor). See In re Edwards,
13 214 B.R. 613, 619 (Bankr. 9th Cir. 1997). However, Edwards
14 involved the recordation of a lis pendens relating to an action
15 against the debtor. Section 362(a)(6) would not apply to an action
16 filed and a lis pendens recorded by the debtor.

17 However, the Court concludes that 11 U.S.C. § 362(a)(3) does
18 apply. This subsection provides that the automatic stay prohibits
19 "any act to...exercise control over property of the estate...."
20 See 11 U.S.C. § 362(a)(3). It may apply to debtors as well as to
21 creditors. See In re BNT Terminals, Inc., 125 B.R. 963, 971
22 (Bankr. N.D. Ill. 1990) ("The court will not tolerate unauthorized
23 acts **by debtors** or creditors by allowing possession of, or
24 facilitating the exercise of control over, or permitting the

25
26 ²¹This claim is not asserted against the Nondebtor Cross-
Defendants.

2 dismemberment of property of the estate outside the provisions of
3 the Code." [Emphasis added.]

4 As noted above, under California law, the recordation of a lis
5 pendens prevents a buyer of the real property from claiming bona
6 fide purchaser status with respect to the asserted claim. Thus, it
7 creates a cloud on title and interferes with a bankruptcy trustee's
8 attempt to sell the real property, perhaps, even reducing the sale
9 price. This qualifies as the exercise of control over the real
10 property. Consequently, because the Court concludes that the
11 recordation of the Lis Pendens violated 11 U.S.C. § 362(a)(3) was
12 therefore void, the Trustee is entitled to summary judgment on the
13 sixth claim for relief.

14 CONCLUSION

15 The Trustee's motion to dismiss or for summary judgment is
16 granted in part and denied in part with respect to the first claim
17 for relief in the Complaint and the fifth claim for relief in the
18 Cross-Complaint. None of the documents attached as exhibits to the
19 Complaint were sufficient to prevent the Warehouse from becoming
20 property of the Debtor's bankruptcy estate, nor were the Deeds of
21 Trust. The Irrevocable Trust Agreement, if bona fide, did
22 effectively transfer to the named beneficiaries an interest in the
23 Warehouse of limited value. However, pursuant to the Irrevocable
24 Trust Agreement, the Debtor retained a substantial beneficial
25 interest in the Warehouse, which became property of his bankruptcy
26 estate.

2 The Trustee's motion to dismiss the second claim for relief in
3 the Complaint is granted in its entirety pursuant to FRCP 12(b)(6).

4 With respect to the Trustee's motion for summary judgment on
5 the first claim for relief in the Cross-Complaint, the motion is
6 granted with respect to the recordation of the Grant Deeds and
7 denied with respect to the Lis Pendens.

8 With respect to the second claim for relief in the Cross-
9 Complaint, the Trustee's motion for summary judgment is granted in
10 its entirety.

11 With respect to the fourth claim for relief in the Cross-
12 Complaint, the Trustee's motion for summary judgment is denied.

13 With respect to the sixth claim for relief in the Cross-
14 Complaint, the Trustee's motion for summary judgment is granted in
15 its entirety.

16 Counsel for Trustee is directed to submit a proposed form of
17 order in accordance with this decision.

18 END OF DOCUMENT
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COURT SERVICE LIST

Miriam Khatiblou
Goldberg, Stinnett, Meyers, and Davis
44 Montgomery Street, #2900
San Francisco, CA 94104

Marc Voisenat
Law Offices of Marc Voisenat
1330 Broadway, #1035
Oakland, CA 94612

Ralbert Brooks-Hamilton
5552 Fremont Street
Oakland, CA 94608